Ooi Cheng Cheng (as administrator and representative to Wilson Tan Teck Hooi, deceased) v AXA Affin General Insurance Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(NCVC)(W)-2346–11 OF 2017
HAMID SULTAN, ABANG ISKANDAR AND MARY LIM JJCA
6 DECEMBER 2018

Insurance — Contract of insurance — Exclusion clause — Deceased bought insurance policy that promised to pay him RM150,000 if he was diagnosed with cancer after 120 days from date of policy — Deceased first diagnosed with cancer five months after date of policy — Insurer repudiated claim for payment of insured sum on ground deceased had symptoms of, or was being tested or treated for cancer, within 90 days of the date of the policy — Whether insurer failed to adduce cogent evidence that allowed it to rely on exclusion clause to repudiate claim

The appellant's husband ('the deceased') bought an insurance policy from the respondent on 1 November 2012 ('the effective date') which promised to pay him RM150,000 ('the insured sum') if he was diagnosed with cancer after 120 days from the effective date. The deceased was diagnosed with lung cancer on 3 April 2013 and died two months later. The respondent repudiated the appellant's claim for the insured sum relying upon cl 3.1(b) of the policy which excluded payment if the claim was related to 'cancer for which the insured person gets medical advice, has symptoms or tests or received any medication or treatment within 90 days from the date such insured person was first covered under this policy'. The High Court dismissed the appellant's claim for payment of the insured sum after agreeing with a written opinion dated 3 January 2014 given by the respondent's chief medical officer in Hong Kong ('Dr Malhotra'). Dr Malhotra had opined that 'the signs and symptoms of underlying advanced lung cancer in the deceased was present and noted within the period of 90 days from the time the insured person was first covered'. Dr Malhotra did not testify at the trial but based his opinion on a medical report issued by the general hospital and the testimony of the deceased's doctor, PW1, a general practitioner. The deceased was PW1's patient from 24 August 2000 until 16 April 2013. PW1 testified that he first treated the deceased for a persistent cough on 5 March 2013 initially diagnosing the condition as pneumonia and later as bronchiolitis but when the chest x-rays showed a worsening condition he suspected tuberculosis ('TB') and referred the deceased to the general hospital for further treatment. PW1 said the hospital's lung tissue test done on 3 April 2013 showed the deceased had cancer. The instant appeal was against the High Court's decision.

Held, allowing the appeal and entering judgment for the appellant for the insured sum with interest:

(1) The deceased was diagnosed with cancer on 3 April 2013, more than 120 days from the policy's inception on 1 November 2012. There was no evidence to show the deceased had any knowledge or anything to do with cancer within the meaning of cl 3.1(b) of the policy earlier. The evidence of the appellant's medical witness, PW1, was consistent with the appellant's case (see para 14(b)).

(2) The respondent did not call any medical witness but relied on Dr Malhotra's report, the admissibility of which was objected to by the appellant. Dr Malhotra's report was only opinion evidence and his observation after the event had no relevance in construing cl 3.1(b) and applying it to the facts of the case. PW1's evidence had strong probative force as he had attended to the deceased during the period in question. All the medical reports as well as PW1's evidence did not reflect the elements stated in cl 3.1(b) of the policy to enable the respondent to deny liability. It was clear from PW1's evidence that the deceased's ailment, diagnosis, treatment, etc within the said '90 days' had nothing to do with cancer. Clause 3.1(b) was not wide enough for the respondent's defence to succeed (see paras 13 & 14(c)–(f)).

(3) A plain meaning of cl 3.1(b) meant that the deceased knew he had cancer or at least when he sought medical assistance or professional help or did tests or received medication, it was for cancer. It he was treated for, or was suspected of having, TB and was tested for that, and although the coughing symptoms in TB might cause one to suspect other ailments like cancer, that was not sufficient. On the facts of the case, cl 3.1(b) was not attracted because none of the para medicals, such as the lab assistant or the doctors who had seen the deceased during the period complained of, knew that his ailment had anything to do with cancer. Neither did the respondent adduce evidence of any person who had attended to the deceased within the '90 days' of the inception of the policy to deal with any issues related to cancer (see paras 10 & 12).

[Bahasa Malaysia summary

Suami perayu ('si mati') membeli polisi insurans daripada responden pada 1 November 2012 ('tarikh berkuat kuasa') yang berjanji untuk membayar beliau RM150,000 ('jumlah yang diinsuranskan') jika beliau didiagnosis dengan kanser selepas 120 hari dari tarikh berkuat kuasa. Si mati didiagnosis dengan kanser paru-paru pada 3 April 2013 dan meninggal dunia dua bulan kemudian. Responden menafikan tuntutan perayu bagi jumlah yang diinsuranskan dengan bergantung pada klausa 3.1(b) dasar yang mengecualikan pembayaran jika tuntutan itu berkaitan dengan 'kanser yang mana orang yang diinsuranskan mendapat nasihat perubatan, mempunyai

gejala atau ujian atau menerima apa-apa ubat atau rawatan dalam tempoh 90 hari dari tarikh orang yang diinsuranskan dilindungi terlebih dahulu di bawah polisi ini'. Mahkamah Tinggi menolak tuntutan perayu untuk pembayaran jumlah yang diinsuranskan selepas bersetuju dengan pendapat bertulis bertarikh 3 Januari 2014 yang diberikan oleh ketua pegawai perubatan responden di Hong Kong ('Dr Malhotra'). Dr Malhotra berpendapat bahawa 'tanda-tanda dan gejala kanser paru-paru yang mendasari pada si mati hadir dan dicatat dalam tempoh 90 hari dari orang yang diinsuranskan dilindungi terlebih dahulu'. Dr Malhotra tidak memberi keterangan pada perbicaraan itu tetapi berdasarkan pendapatnya mengenai laporan perubatan yang dikeluarkan oleh hospital awam dan testimoni doktor yang meninggal dunia, PW1, seorang pengamal am. Si mati adalah pesakit PW1 dari 24 Ogos 2000 sehingga 16 April 2013. PW1 memberi keterangan bahawa beliau mula-mula merawat si mati kerana batuk yang berterusan pada 5 Mac 2013 pada mulanya mendiagnosis keadaan itu sebagai radang paru-paru dan kemudiannya sebagai bronchiolitis tetapi ketika dada x-ray menunjukkan keadaan yang semakin buruk dia mengesyaki tuberkulosis ('TB') dan merujuk si mati kepada hospital awam untuk rawatan lanjut. PW1 berkata ujian tisu paru-paru hospital pada 3 April 2013 menunjukkan si mati mempunyai kanser. Rayuan ini adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, membenarkan rayuan dan memasukkan penghakiman untuk perayu bagi jumlah yang diinsuranskan dengan faedah:

(1) Si mati didiagnosis dengan kanser pada 3 April 2013, lebih daripada 120 hari dari permulaan dasar pada 1 November 2012. Tiada keterangan menunjukkan si mati mempunyai pengetahuan atau apa-apa kaitan dengan kanser dalam klausa 3.1(b) dasar sebelum ini. Keterangan saksi perubatan perayu, PW1, adalah selaras dengan kes perayu (lihat perenggan 14(b)).

(2) Responden tidak memanggil mana-mana saksi perubatan tetapi bergantung kepada laporan Dr Malhotra, kebolehterimaan yang ditolak oleh perayu. Laporan Dr Malhotra hanya merupakan keterangan pendapat dan pemerhatiannya selepas kejadian itu tidak mempunyai kaitan dengan pentafsiran klausa 3.1(b) dan mengaitkan kepada fakta kes itu. Bukti PW1 mempunyai kekuatan pembuktian yang kuat kerana belliau telah merawat si mati pada masa yang dipersoalkan. Semua laporan perubatan serta keterangan PW1 tidak mencerminkan unsur-unsur yang dinyatakan dalam klausa 3.1(b) dasar untuk membolehkan responden menolak liabiliti. Ia jelas dari keterangan PW1 bahawa penyakit, diagnosis, rawatan, sebagainya dalam tempoh '90 hari' tidak ada kaitan dengan kanser. Klausa 3.1(b) tidak cukup luas bagi pembelaan responden untuk berjaya (lihat perenggan 13 & 14(c)–(f)).

(3) Maksud jelas klausa 3.1(b) bermaksud bahawa si mati tahu bahawa

beliau mempunyai kanser atau sekurang-kurangnya ketika beliau mencari bantuan perubatan atau bantuan profesional atau melakukan ujian atau menerima ubat, itu adalah untuk kanser. Jika beliau dirawat, atau disyaki mempunyai, TB dan diuji untuk itu, dan walaupun gejala batuk dalam TB mungkin menyebabkan seseorang mengesyaki penyakit lain seperti kanser, adalah tidak mencukupi. Pada fakta kes, klausa 3.1(b) tidak berkait kerana tiada seorang pun daripada paramedik, seperti pembantu makmal atau doktor yang telah melihat si mati dalam tempoh yang dirungut, tahu bahawa penyakit beliau ada kaitan dengan kanser. Responden juga tidak memberikan keterangan mana-mana orang yang telah merawat si mati dalam masa '90 hari' dari permulaan polisi untuk menangani sebarang masalah yang berkaitan dengan kanser (lihat perenggan 10 & 12).]

Notes

For cases on exclusion clause, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 82–85.

Cases referred to

KNK Development Sdn Bhd & Ors v Sumbangan Aneka Sdn Bhd [2018] MLJU 1281, CA (refd)
Thornton v Shoe Lane Parking Ltd [1971] 1 All ER 686, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 69
Consumer Protection Act 1999

Appeal from: Appeal No 22NCVC-59–04 of 2014 (High Court, Pulau Pinang)

N Ahilan (Ong & Assoc) for the appellant.
Gurmukh Singh (Isharidah Ho Chong & Menon) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant/plaintiff (the wife of the deceased) appeals against the decision of the learned High Court judge who refused to enter judgment for the insurance claim for the sum of RM150,000 pursuant to a 'Cancer Plus Plan 150k' policy, notwithstanding that the deceased was not diagnosed with cancer within 120 days from the inception of the policy for the respondent/insurer to deny liability under the policy.

[2] The learned counsel for the appellant had at the commencement of the

appeal informed us that they are limiting their claim as per the policy terms only with other incidental orders.

PRELIMINARIES

[3] At the outset, we must say that the appellant had prayed for two declarations which in our view is not necessary on the facts of the case. The case is primarily related to breach of insurance policy terms. In consequence, we only allowed prayer (c) related to RM150,000 with interests and costs and nothing more.

[4] This case is in essence related to the construction of the terms of the policy and its application to the facts of the case. The relief is related to breach of contract only. It will appear from the pleadings and prayers the plaintiff had confused the learned judge and in consequence the plaintiff's claim was dismissed. The plaintiff's prayer which is a non-starter except for prayer (c) and interests and costs read as follows:

27. Oleh yang demikian, Plaintif menuntut terhadap Defendan:

(a) satu deklarasi yang menyatakan bahawa klausa polisi insurans Defendan terutamanya yang memperuntukkan bahawa, '*We do not pay for claims related to 3.1(b) cancer for which the insured person gets medical advice, has symptoms, or tests, or received any medication or treatment within 90 days from the date such insured person was first covered under this policy*', adalah terbatal dan tidak berkesan kerana bertentangan dengan polisi awam dan/atau menyalahi undang-undang dan/atau ekuiti;

(b) satu deklarasi yang menyatakan bahawa semua klausa terutamanya klausa 3.1(b) dalam polisi insurans Defendan tersebut yang bertentangan dengan polisi awam dan/atau menyalahi undang-undang dan/atau ekuti adalah terbatal, tidak berkesan dan tidak boleh dipakai;

(c) RM150,000-00;

(d) gantirugi sebanyak RM2 juta atau satu jumlah yang dianggap sesuai dan adil oleh Mahkamah:

(i) tekanan mental dan emosi;

(ii) kebimbangan dan kesan psikologi terhadap Plaintif;

(iii) kekecewaan dan kesulitan, dan

(iv) pelanggaran tanggungjawab fidusiari terhadap si mati.

(e) gantirugi teruk (*aggravated damages*);

(f) gantirugi teladan;

(g) secara alternatif, gantirugi-gantirugi yang diawardkan ditaksir oleh Timbalan/Penolong Kanan Pendaftar;

(h) faedah pada kadar yang ditetapkan mengikut arahan Ketua Hakim Negara atas semua gantirugi yang diawardkan oleh Mahkamah dikira dari tarikh tuntutan dibuat iaitu 31/05/2013 sehingga tarikh realisasi penghakiman sepenuhnya;

(i) kos;

(j) lain-lain perintah atau relief yang dianggap sesuai dan manfaat oleh Mahkamah yang Mulia ini. (Emphasis added.)

BRIEF FACTS

[5] To save court's time, we set out the brief facts of the case and the grounds of the decision of the learned trial judge which were placed in a rudimentary manner before us, which read as follows:

(a) Wilson Tan Heck Hooi ('the deceased') was the plaintiff's husband. He bought an insurance policy known as 'Cancer Plus Plan 150k' ('the policy') which took effect since 1 November 2012. Under this policy, when an insured is diagnosed with cancer, after 120 days from the effective date, the sums insured shall become payable;

(b) the deceased was diagnosed with lung cancer on 3 April 2013 and passed away on 4 June 2013;

(c) the plaintiff pursue a claim for RM150,000 under the policy;

(d) the defendant repudiate the claim by virtue of cl 3.1(b) of the policy on the ground the symptom of the lung cancer had started around January 2013, within three months after the policy was incepted;

(e) the plaintiff in this suit claims for among others, a declaration that cl 3.1(b) of the policy is void and unenforceable as it is against the public policy, law and equity, and the sum of RM150,000 under the policy; and

(f) the High Court dismissed the plaintiff's claim thus this appeal by the plaintiff.

FINDING OF LEARNED HIGH COURT JUDGE

1. the plaintiff failed to prove that the deceased bought the insurance by misrepresentation, fraud, duress, undue influence and cheating.

2. the parties are bound by the terms of the contract they had signed. It is not open for the plaintiff to say cl 3.1(b) and other exclusion clauses are unfair or against public policy; and

3. the court accepted the report by Dr Malhotra despite he did not testify in court because his report is based on medical report from General Hospital Sungai Petani and evidence by PW1, Dr Song Wai Leng. The court found that the signs and symptoms of the underlying advanced lung cancer in the client was present and noted within the period of 90 days from the time the insured person was first covered.

[6] The memorandum of appeal reads as follows:

1. Yang Arif hakim yang terpelajar telah terkhilaf dari segi fakta dan undang-undang dengan membuat keputusan berdasarkan penerimaan keterangan pakar Responden iaitu 'Medical Review Form' yang disediakan oleh Dr Yuvraj Malhotra (selepas ini dirujuk sebagai 'Medical Review Form tersebut') walaupun:

   (a) beliau tidak dipanggil sebagai saksi oleh Responden semasa perbicaraan untuk memberi keterangan dan lalu diperiksa-balas oleh Perayu;

   (b) beliau adalah seorang pakar yang 'bias' dan di bawah pengajian

   (c) Responden (*under the payroll of the Respondent*) pada segala masa yang material;

   (d) beliau gagal membuat afidavit mengekshibitkan dan menentusahkan Medical Review Form tersebut;

   (e) Medical Review Form tersebut juga gagal memberikan butir-butir kelayakan (qualifikasinya) dan sebagainya.

   sebagaimana yang dikehendaki secara mandatori oleh Aturan 40A Kaedah 3, Kaedah-Kaedah Mahkamah 2012.

2. Yang Arif hakim yang terpelajar telah terkhilaf dari segi fakta dan undang-undang dengan tidak mengambil kira Seksyen 114(g) Akta Keterangan 1950.

3. Yang Arif hakim yang terpelajar telah terkhilaf dari segi fakta dan undang-undang dengan menerima 'Medical Review Form tersebut' sebagai keterangan pakar di mana Dr Yuvraj Malhotra bukan seorang pakar kanser atau 'oncologist' yang pernah merawat dan/atau memeriksa si mati, Wilson Tan Teck Hooi dan oleh itu telah melanggar Seksyen 45, Akta Keterangan 1950.

4. Yang Arif hakim yang terpelajar telah terkhilaf dari segi fakta dan undang-undang dengan menolak keterangan saksi pakar yang disapina oleh Perayu, Dr Song Wai Leng yang mula-mula telah merawat dan memeriksa si mati sedangkan tidak ada saksi pakar yang dipanggil oleh Responden untuk 'rebut' dan/atau menentang keterangan Dr Song Wai Leng yang mengesahkan bahawa tidak ada atau wujudnya bukti yang menunjukkan si mati telah menghidapi kanser paru-paru atas petanda batuk pada sekitar tempoh masa dari Januari 2013 sehingga Mac 2013.

5. Yang Arif hakim yang terpelajar telah terkhilaf dari segi fakta dan undang-undang dengan gagal mempertimbangkan dan/atau mengambil kira rekod perubatan si mati bahawa beliau pernah menghidapi batuk sebelum Mac 2013 yang tidak ada kena-mengena dengan kanser paru-paru.

6. Yang Arif yang terpelajar telah terkhilaf dari segi fakta dan undang-undang dengan membuat andaian atau kesimpulan bahawa saksi pakar Perayu, Dr Song Wai Leng telah membuat diagnosis yang salah apabila beliau memberi preskripsi rawatan kepada si mati untuk

'pneumonia' pada 5-3-2013, 'acute bronchiolitis' pada 11-3-2013 dan 'pulmonary tuberculosis (TB)' pada 18-3-2013 walaupun tidak ada atau wujudnya bukti perubatan yang menunjukkan si mati telah menghidapi kanser paru-paru pada ketika itu. A

7. Yang Arif yang terpelajar telah terkhilaf dari segi fakta dan undang-undang dengan membuat andaian atau kesimpulan bahawa si mati telah menghidapi kanser paru-paru tahap 1, tahap 2 dan 3 sebelum April 2013 memandangkan pada sekitar tempoh masa dari Januari 2013 sehingga Mac 2013 tersebut tidak ada atau wujudnya bukti perubatan yang dapat mengesahkan bahawa si mati telahpun menghidapi kanser paru-paru tahap 1 atau tahap 2 atau tahap 3. B C

8. Yang Arif yang terpelajar telah terkhilaf dari segi fakta dan undang-undang dengan membentuk 'medical opinion' sendiri tanpa bukti perubatan (*medical evidence*) yang dapat mengesahkan bahawa batuk yang dialami oleh si mati sejak Mac 2013 adalah petanda (*symptom*) kanser paru-paru yang telah wujud dalam tempoh masa (90) sembilan puluh hari dari tarikh si mati diberi perlindungan insurans pada 1-11-2012. D

9. Yang Arif hakim yang terpelajar telah terkhilaf dari segi fakta dan undang-undang kerana gagal dan/atau tidak mengambil-kira bahawa klausa pengecualian (*exclusion clause*) dan/atau kandungannya terutamanya Klausa 3.1(b) polisi insurans tidak dibawa kepada perhatian pembeli polisi, Wilson Tan Teck Hooi, si mati sebelum beliau mengambil keputusan untuk membeli polisi insurans tersebut daripada Responden. E

10. Yang Arif hakim yang terpelajar telah terkhilaf dari segi fakta dan undang-undang kerana mengambil-kira dan/atau mendapati bahawa klausa pengecualian iaitu Klausa 3.1(b) tersebut telah dibawa kepada perhatian si mati sebelum beliau membeli polisi insurans tersebut daripada Responden yang bertentangan dengan keterangan Responden melalui transkripnya. F

11. Yang Arif yang terpelajar telah terkhilaf dari segi fakta dan undang-undang dengan tidak mengambil kira dan/atau mengguna-pakai 'contra proferentum rule' terhadap Klausa 3.1(b) polisi insurans tersebut yang tidak adil, tidak jelas dan bertentangan dengan polisi awam. G

12. Yang Arif yang terpelajar telah terkhilaf dari segi akta dan undang-undang dengan tidak mengambil kira dan/atau mengguna-pakai Akta Perlindungan Konsumer 1999 terhadap Klausa 3.1(b) polisi insurans tersebut. H

13. Yang Arif yang terpelajar telah terkhilaf dari segi fakta dan undang-undang bahawa pihak-pihak adalah terikat dengan terma-terma kontrak polisi insurans memandangkan si mati tidak pernah menandatangani kontrak tersebut dan terma-terma polisi insurans tersebut adalah dikenakan secara satu pihak (unilaterally imposed) dan hanya dihantar kepada si mati dalam tempoh masa empat belas (14) hari selepas pembelian polisi insurans tersebut oleh si mati. I

14. Yang Arif hakim yang terpelajar telah terkhilaf dari segi fakta dan undang-undang kerana gagal mengambil kira representasi, dorongan dan/atau galakan yang dibuat oleh ejen atau wakil Responden kepada si mati bahawa beliau boleh membuat tuntutan selepas 120 hari pembelian insuran polisi tersebut daripada Responden dengan membuat satu pemeriksaan badan (body check-up) tidak kira tahap kanser yang mungkin dihidapi oleh si mati pada ketika itu, si mati masih boleh membuat tuntutan kerana laporan perubatan tidak akan menyebut bila seseorang itu menghidapi kanser.

15. Yang Arif hakim yang terpelajar telah terkhilaf dari segi fakta dan undang-undang walaupun Responden telah dimaklumkan oleh si mati bahawa beliau adalah seorang perokok (*smoker*), namun demikian Responden masih mendorong, membuat representasi dan/atau menyakinkan si mati masih boleh membeli polisi insurans tersebut daripada Responden dan tidak perlu membuat pemeriksaan badan (*body check-up*) terlebih dahulu.

16. Yang Arif hakim yang terpelajar atas alasan-alasan yang dinyatakan di atas ini sepatutnya tidak harus membuat keputusan tersebut sebagaimana yang diberikan oleh beliau tetapi sepatutnya membenarkan tuntutan Perayu/Plaintif sepertimana dituntut dan dihujahkan.

JURISPRUDENCE RELATED TO LAW AND APPLICATION TO THE FACTS

[7] The central argument of the defendant to deny liability was essentially based on the construction of cl 3.1(b) which reads as follows:

> 3 What we do not pay for (exclusions and limitations)
>
> 3.1 We do not pay for claims related to:
>
> ...
>
> (b) cancer for which the insured person gets medical advice, *has symptoms,* or tests, or *received any medication or treatment within 90 days from the date such insured person was first covered under this policy.*

[8] The clause which the respondent is relying on is subject to two jurisprudential principles related to construction of a term of a contract and the contra proferentem rule.

[9] The plaintiff had also, inter alia, anchored the argument on the case of *Thornton v Shoe Lane Parking Ltd* [1971] 1 All ER 686, to say that the defendant had not explained the exclusion clause and also had relied on the Consumer Protection Act 1999.

[10] In the instant case, in our view a plain meaning of cl 3.1(b) will mean that the deceased knew that he had cancer or at least when he approached for

medical assistance for any ailment, medical assistance or professional help, he knew that he had symptoms or asked to do tests or received medication for cancer. The key word is 'cancer'. If he is treated or suspected of TB and tested for that though the coughing symptoms in TB cases may also attract one to suspect other ailments like cancer, this may not be sufficient.

[11] Even if we are wrong, the contra proferentem rule will assist the appellant/plaintiff to justify our views in the construction of cl 3.1(b).

[12] On the facts of the case, cl 3.1(b) will not be attracted because none of the para medical, such as lab assistant or the doctors in attendance who had seen the deceased during the period complained of, knew that the deceased's ailment had anything to do with cancer. Neither did the defendant adduced evidence of any person who had attended to the deceased within the '90 days' of the inception of policy to deal with any issues related to cancer.

[13] The plaintiff's main witness's evidence is clear that the patient's ailment, diagnosis, treatment, etc within the said '90 days' had nothing to do with cancer. In addition, there was no positive evidence of any kind by the deceased to show otherwise to reject the policy. The learned trial judge has captured and summarised the plaintiff's and defendant's evidence which reads as follows:

> Dr Song Wai Leng (PW1) is a General Practitioner of 22 years. His evidence was the deceased was his patient since 24.8.2000. The last time he had seen the deceased is on 16.4.2013. He knew the deceased was a smoker. He told the court, on 5.3.2013 the deceased came to see him complaining about his cough for more than two months. He then perform a chest x-ray on the deceased and in his opinion the deceased had right lung pneumonia. On 11.3.2013, again the deceased came to see him as his cough was still persisting. This time, he suspected the deceased was suffering from acute bronchiolitis and prescribed him with oral medicine and symbicortturbohaler. On 18.3.2013, the deceased came to see him (for the 3rd time in two weeks), complaining that his cough had not improved. PW1 then did another chest x-ray on him. The second chest x-ray showed that the intensity of the mottling tissue feature was worse compared to the previous x-ray. He then suspected the deceased had pulmonary tuberculosis (TB) and referred the deceased to the General Hospital in Sungai Petani. On 10.4.2013, the deceased again came to see him complaining about his cough. This witness agree that without the lab report from the lung tissue, the doctors from the hospital thought the deceased was likely to suffer from lung infection. He also agree that the deceased had chronic cough. He also said it is possible that the deceased was suffering from lung infection which subsequently developed into cancer on a later date. When asked to tell when did the deceased started to suffer lung cancer, PW1 said from the hospital report, it is stated that the lung tissue obtained on 3.4.2013 was consistent with adenocarcinoma, a type of lung cancer. He can safely say the deceased suffers from lung cancer on 3.4.2013. The deceased was confirmed diagnosed with stage 4 lung cancer on 21.4.2013, based on medical report prepared by General Hospital Sungai Petani.

Finally, this witness says the symptom of persistent cough alone is insufficient to confirm the deceased had a lung cancer.

When cross-examined by the defendant's counsel, PW1 agree chronic coughing is a symptom for lung cancer. He also agree that there are cancer stage 1, stage 2 and stage 3. But he does know how long is each stage. Since the deceased was diagnosed with stage 4 cancer on 21.4.2013 and the cancer has spread to his brain when he died in June 2013, questions were posed to PW1 in the following manner:

> Q: And complained of cough which was not resolving since January 2013. I put it to you that he already had cancer in his system. In all probability he already had cancer in his system. Your answer, please?
>
> A: I cannot be sure.
>
> Q: Refer page 17 defendant's bundle. It is the death certificate and the cause of death is cancer brain secondary from lung. Can you explain what this means?
>
> A: That means the cancer from lung already spread to the brain.
>
> Q: Cancer from the lung spread on to the brain. Now is this sort of a process instantaneous or does it take time?
>
> A: It depends.
>
> Q: You are unable to answer that question?
>
> A: Yes, unable to answer.
>
> Q: Now in light of your inability to answer this question, how can you possibly say that he may have had lung infection which developed into cancer on a later date?
>
> A: This is a possibility.

The defendant's sole witness, Teh Yau Kun (DW1) is the Head of the Non Motor Claims Department of the defendant. His testimony is the plaintiff's claim was rejected because the deceased had symptoms of lung cancer within 90 days from the inception of the Policy. It is his evidence that the defendant referred the deceased's case to Dr Yuvaraj Malhotra, Chief Medical Officer of AXA Asia in Hong Kong. Based on Dr Yuvaraj's Medical Review Report dated 3.1.2014, the defendant found that clause 3.1 (b) applied and exclude the defendant's liability. This witness also denied there was misrepresentation or fraud exerted on the deceased.

[14] We have read the appeal records and the able submissions of the parties. After giving much consideration to the respondent's submission, we find that the appeal limited to prayer (c) with interests and costs has merits. Our reasons, inter alia, are as follows:

(a) prayer (a) and (b) is related to declaration. Declaratory relief is a discretionary relief. This is not a fit and proper case to grant declaration and very importantly when the cause of action for the plaintiff is in substance for breach of the policy terms (see *KNK Development Sdn Bhd*

& Ors v Sumbangan Aneka Sdn Bhd [2018] MLJU 1281);

(b) the date of inception of the policy is 1 November 2012. The deceased was only diagnosed with cancer on 3 April 2013. That is to say, more than 120 days from inception. There was no evidence to show that the deceased had any knowledge or anything to do with cancer within the meaning of policy terms in cl 3.1(b) earlier. The plaintiff's medical witness (PW1) evidence was consistent with the plaintiff's case;

(c) the defendant did not call any medical witness but relied on the report of Dr Yuvraj Malhotra, which was marked as ID which, inter alia, reads as follows:

> Medical Inference:
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> Cancers of Lung typically cause symptoms only when the disease is advanced. The commonest symptoms of Lung Cancers are as follows:
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> — A 'new' Cough, which does not go away (persistent):
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> — Blood in Cough
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> — Shortness of Breath (difficulty in breathing)
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> — Chest Pain or other similar Chest Complaints
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> — Generalized complaints of weight loss/ tiredness/ fatigue, etc.
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> Among these, the most common and prominent symptom is a new and persistent cough with or without other symptoms. Lung cancer patients are often symptomatic for many months before presentation, irrespective of their disease stage at diagnosis (Corner J et al 2005). Adenocarcinoma lung is classify as Non-Small Cell cancers which contribute 40% of lung cancer. These cancers normally start secreting substances such as a mucus. It tends to grow slower than other types of lung cancer2. It is not clear which symptoms come earlier than others and this varies with patient to patients. In the current case, I note that the client presented with 'Decrease effort tolerance' as on 27/12/2012. Unfortunately, for the client no further review of the cause of this was done. This was followed by 'new cough' which the client suffered for more than 2 months before he consulted for first time on 5/3/2013, then on 11/03/2013 and then again on 18/03/2013 before being formally diagnosed of 'Lung Cancer' on 02-04/04/2013. It is further noted that this 'new and persistent cough' is what also directly lead to further investigations and final diagnosis.
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> This clearly indicated that two (02) of the most common signs/ symptoms of Lung Cancer, namely 'new cough' which does not go away and 'shortness of breath' (Decrease effort tolerance) were well noted within the '*90 days from the date such insured person was first covered under this policy*'.
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> Based on all above facts and medical information's, it is my medical opinion that the signs and symptoms of the underlying advanced lung cancer in the

client were present and noted within the period of 90 days from the time the insured person was first covered.

(d) in our view, PW1's evidence has strong probative force as he had attended to the deceased during the period in question. All the medical reports as well as his evidence do not reflect the elements stated in cl 3.1(b) of the policy in particular, for the defendant to deny liability;

(e) Dr Yuvraj Malhotra's evidence is only opinion evidence and his observation after the event has no relevance in construing cl 3.1(b) and applying it to the facts of the case; and

(f) it is beyond doubt that cl 3.1(b) is not sufficiently wide enough for the defendant's defence to succeed. Further, the plaintiff had objected to the admissibility of Dr Malhotra's report.

[15] For reasons stated above, we took the view that the appeal has merit and in exercise of our powers under s 69 of the Courts of Judicature Act 1964 — this is a fit and proper case to enter judgment for the plaintiff for the sum of RM150,000 with 5% interest pa from the date of filing of writ to the date of realisation of the judgment sum and with costs of RM30,000 here and below, subject to allocator. Deposit to be refunded.

We hereby ordered so.

Order accordingly.

Reported by Ashok Kumar